EX PARTE OR LATE FILED

DOW, LOHNES & ALBERTSON, PLLC
ATTORNEYS AT LAW

ORIGINAL

J.G. HARRINGTON
DIRECT DIAL 202-776-2818
jharrington@dlalaw.com

WASHINGTON, D.C.
1200 NEW HAMPSHIRE AVENUE, N.W. · SUITE 800 · WASHINGTON, D.C. 20036-6802
TELEPHONE 202-776-2000 · FACSIMILE 202-776-2222

ONE RAVINIA DRIVE · SUITE 1600
ATLANTA, GEORGIA 30346-2108
TELEPHONE 770-901-8800
FACSIMILE 770-901-8874

June 30, 2004

RECEIVED
JUN 30 2004
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 - 12th Street, SW, Room 8B201
Washington, DC 20554

Re: "Pick and Choose" Rulemaking
CC Docket Nos. 01-338, 96-98, 98-147
Notice of Oral Ex Parte Communications

Dear Ms. Dortch:

I am writing this letter to report that on June 29, 2004, Alexandra Wilson, Vice President, Public Policy, of Cox Enterprises, Inc., acting on behalf of Cox Communications Inc. ("Cox"), and I met by telephone with Christopher Libertelli, Senior Legal Advisor to Chairman Powell. Ms. Wilson and I also met separately with John Stanley, Assistant General Counsel, William Scher of the Office of General Counsel, Jeremy Miller, Assistant Chief of the Competition Policy Division of the Wireline Competition Bureau, and Jon Minkoff and Christi Shewman, also of the Wireline Competition Bureau. Each of these meetings concerned Cox's position in the above-referenced proceeding, detailed in the attached summary, that any changes to the "Pick-and-Choose" rule should, at a minimum, preserve CLECs' ability to adopt arbitrated provisions in existing ILEC interconnection agreements.

In accordance with the requirements of Section 1.1206 of the Commission's rules, the original and one copy of this letter are being submitted to your office on this date and a copy of this letter is being sent to each Commission staff member present at the meetings.

Please inform me if any questions should arise in connection with this letter.

Sincerely,

J.G. Harrington
Counsel to Cox Communications, Inc.

Enclosure
cc: Christopher Libertelli, Esq.
John Stanley, Esq.
Jon Minkoff, Esq.
Jeremy Miller, Esq.
William Scher, Esq.
Christi Shewman, Esq.

ISSUES IN THE PICK-AND-CHOOSE PROCEEDING
COX COMMUNICATIONS, INC.

Pick-and-Choose Should Be Permitted for Arbitrated Provisions of Agreements

As explained in its comments in this proceeding, Cox supports the Commission's current interpretation of the pick-and-choose rule. Should the Commission modify that interpretation, Cox supports a rule that continues to permit carriers to opt in to any provision adopted in an arbitration. This approach is a reasonable middle ground between the current rule and an all-or-nothing approach that would impose unnecessary costs on CLECs.

- Adopting Cox's proposal will not create any perverse incentives in ILEC-CLEC interconnection negotiations. CLECs like Cox have limited resources that they can devote to arbitrating disputes, and arbitrating even a few interconnection provisions can be extremely time consuming and expensive.[1] It is simply impracticable for them to arbitrate entire agreements, which is why the suggested approach is so critical. Given the delays and costs involved, moreover, there is absolutely no incentive for a CLEC to arbitrate terms that are not critical to its ability to provide telecommunications services in accordance with its own network architecture and business plan. And, CLECs that go to arbitration do not gain anything new – if anything, they lose whatever competitive advantage they might have gained had other CLECs been unable to benefit from the results of their arbitration.

- The Cox proposal also would address ILEC concerns regarding negotiated terms that were agreed to as a result of creative negotiations. By their nature, arbitrated terms are not negotiated terms and would not be tied to the results of negotiations. In fact, in Cox's experience, it has been able to negotiate some terms successfully with ILECs, but has nonetheless had to arbitrate certain key interconnection provisions (or rely on negotiated or arbitrated provisions secured by other CLECs concerning the same subject matter).

- Cox is highly unlikely to be able to opt into a whole agreement *negotiated* by another CLEC. ILECs rarely, if ever, voluntarily agree to certain critical terms that Cox needs (hence the unavailability of such terms in a negotiated agreement) and other CLECs typically have different needs because of the nature of their networks and business plans. As Cox described in its comments, even where a CLEC has arbitrated certain terms, it still is unlikely that the particular network architecture reflected in the entire agreement will match the network design used by Cox. This is why Cox often takes provisions from multiple agreements.

---

[1] For instance, the Commission's Virginia arbitration proceeding required Cox to file an arbitration petition, to file initial and rebuttal testimony, to prepare and respond to discovery requests, to participate in multiple pre-hearing conferences, to prepare several documents summarizing the issues and its positions, to participate in close to two weeks of hearings, to file two briefs, to file several motions and responsive pleadings, and to respond to petitions for reconsideration, all to resolve only a handful of issues. This process required substantial time from outside counsel, in-house lawyers and Cox's regulatory staff, as well as an outside expert.

- Forcing Cox to re-arbitrate previously arbitrated provisions would impose unnecessary and harmful costs and delays. There is no reason to expect, moreover, that ILECs will incorporate arbitrated provisions into their template agreements the next time they negotiate with Cox. In fact, Cox's experience suggests just the opposite: When a term is arbitrated, the ILECs often do not incorporate the arbitrated version in their template agreements, but instead maintain the provision they prefer. For instance, MCI arbitrated reasonable "transit" triggers in its arbitration with Pacific Bell; subsequent to that decision, PacWest was forced to re-arbitrate the transit trigger. Similarly, in the Virginia arbitration at the Commission, Verizon forced Cox to arbitrate a provision that would have required Cox to provide collocation to Verizon, even though the Commission's rules do not permit an ILEC to demand collocation.[2] The solution Cox has proposed prevents ILECs from forcing every CLEC to arbitration while preserving ILECs' ability to bargain.

- To the extent the Commission concludes that it has the authority to modify the current rule, the rule proposed by Cox also would be within the Commission's authority. It would be reasonable to conclude that arbitrated terms are separable from negotiated elements of agreements because they are determined separately from the negotiated terms, and for the Commission to conclude that a negotiated agreement (or the negotiated portion of an agreement that includes some arbitrated provisions) is a unitary whole and therefore not separable into distinct elements. At the same time, each arbitrated element of an agreement is separable because states address each arbitration issue separately and independently of other elements of the agreement. Indeed, under Section 252(b)(4), a state can consider only the issues that are raised in the parties' arbitration petitions, and cannot consider modifications to any agreed-upon language in an interconnection agreement as part of the arbitration process. Consequently, arbitrated provisions constitute individual, separate elements of the ILEC-CLEC relationship, distinct from the negotiated portion of the agreement.

- By statute, the states also apply a different standard to arbitrated provisions than they do to negotiated agreements,[3] and must make an affirmative finding that an arbitrated provision complies with the requirements of Section 251 and the relevant implementing rules. The states thus do not consider the business trade offs that might have been made in negotiated agreements when resolving open issues brought to them for arbitration. Accordingly, the Commission could reasonably conclude that permitting carriers to opt in to arbitrated terms but not negotiated terms would not undermine incentives for parties to negotiate creative arrangements.

---

[2] The Commission, unsurprisingly, resolved this issue by adopting Cox's proposed language.

[3] Under Section 252(e), states must approve negotiated agreements unless they discriminate against carriers that are not party to the agreement or are inconsistent with the public interest, while arbitrated provisions cannot be approved if they do not "meet the requirements of section 251," including the Commission's implementing rules, or the requirements of Section 252(d).

Addressing Potential Abuses or Improper Incentives

If the Commission believes that permitting CLECs to opt in to any arbitrated provisions may create improper incentives, it has two alternatives. First (and preferably), it could indicate its intent to monitor how well the modified rules work, and to revisit the rules after a defined period if there are abuses. Second, the Commission could limit pick-and-choose rights to "core" interconnection provisions, as described below.

- The simplest approach is to adopt Cox's proposed rule and monitor carrier behavior. If experience shows that carriers abuse the right to adopt arbitrated provisions, the Commission can revisit the rules to correct specific problems that arise.

- At a minimum, the Commission should adopt a rule that permits carriers to opt in to any provision related to core interconnection issues that was adopted via arbitration. Examples of such issues include points of interconnection, triggers for direct interconnection with end offices, collocation, transiting and reciprocal compensation. These issues go to the heart of the co-carrier relationship and the ability of facilities-based carriers to mutually exchange traffic; without a reasonable resolution of these issues, even carriers who have completely built out their own networks would be unable to provide competitive telephony services. Core interconnection provisions would be those that implement Section 251(b)(2) through (b)(5), Section 251(c)(2) and Section 251(c)(6).

- To the extent it concludes it can modify the current rule, the Commission also has the authority to limit pick-and-choose to core interconnection issues. It could base such a limitation on its prior and repeated policy determination that the local competition rules should foster facilities-based competition, its authority to prevent evasions of its rules, and its power under Section 4(i) to take actions necessary to implement the goals and policies of the Communications Act.